NO. 48274-6-II

IN THE UNITED STATES COURT OF APPEALS
DIVISION II

IN RE: THE DEPENDANCY OF:
H.N.S.-MINOR CHILD AND
B.N.S.-MINOR CHILD

DAN SHERWOOD,

Petitioner/Appellant,

V.

BEVERLY VAN SANTFORD.

Respondent/Appellee.

Appeal from the Superior Court of Washington
In and for the County of Kitsap

APPELLANT'S OPENING BRIEF

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INTRODUCTION

Dan Sherwood ("Sherwood") appeals the trial court's order modifying a parenting plan. He argues that the trial court erred in modifying the parenting plan when the basis for modification should have been denied as Beverly Van Santford ("Van Santford") during residential time brought the children to Washington State and in contempt of a Kansas Judge's orders failed to return them to their father. Instead Van Santford made allegations of abuse against Sherwood which were found to be "unsubstantiated". At this point the Kitsap County Superior Court abused its discretion in not allowing the children to be returned to Sherwood, who had full custody in the original parenting plan. Prior to trial Sherwood, who lives in Iowa filed a Motion for Continuance and the trial judge denied his motion. Since Sherwood was not present Van Santford was awarded full custody of the children and Sherwood was given very limited time with them. Van Santford voluntarily gave Sherwood custody of the children in 2009. Then came during summer residential time made numerous efforts through three different counties in Kansas, claims of abuse against Sherwood. All found to be "unsubstantiated" until she came to Kitsap County, Washington and obtained what she had been fishing for.

All a manipulation by Van Santford to get her children back. Somehow Van Santford has used her manipulation and false claims through four counties and three states all for the purpose of re-gaining custody of her children. Sherwood believes as it is pretty obvious that Van Santford won bias in Kitsap County due to her working in Domestic Violence and her husband being a Kitsap County Police Officer. Sherwood attempted to have venue changed but was denied. This was an obvious conflict of interest.

As it will be proven Van Santford kidnapped her children from their father. Brought them to Washington State where she worked closely with the Kitsap County Courthouse. After three courts denying her motions in Kansas, she convinced Kitsap County to without merit take custody completely away from Sherwood.

ASSIGNMENTS OF ERROR

1. The trial court erred in applying the incorrect "best interests of the child" standard for custody.
2. The trial court erred in denying Sherwood's Motion for Continuance.
3. The trial court erred in allowing Van Santford to commit perjury.

4. The trial court erred in finding in favor of Van Santford without sufficient evidence to her claims.

5. The trial court erred in awarding Van Santford attorney's fees.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the trial court apply the correct standard for the "best interest of the child"?
2. Did the trial court error in failing to continue the case so Sherwood could be present at trial?
3. Did the trial court error in allowing Van Santford to commit perjury?
4. Did the trial court error in entering judgment against Sherwood without sufficient evidence of Van Santford's claims?
5. Did the trial court error in entering payment of attorney's fees by Sherwood?

STATEMENT OF THE CASE

Sherwood was granted custody of his children in an agreed Petition for Divorce May 2009 by agreed motion in Harvey County, Kansas.

1. June 29, 2010, Van Santford filed a Motion to change residential custody in Harvey County, Kansas and on July 1, 2010, Sherwood filed a Motion to dismiss. (Included in Petition) RP 57

   The Court ordered on July 22, 2010:

   a. The Respondent's Motion for Emergency Change of Custody is overruled and denied. The Court finds that there is no emergency.

   b. The Respondent, Beverly D. Sherwood, shall return the parties' minor children, Brandon Sherwood (2003) and Heather Sherwood (2003, to the Petitioner Harold D. Sherwood. The time of the exchange is 5:00 p.m. on July 22, 2010. The location of the exchange shall take place in front of the Newton Police Department, Newton, Kansas.

2. On June 30, 2010 SRS in Chanute, Kansas received a report of abuse against Sherwood. Their findings were: Unsubstantiated stating "It is recommended that Brandon receive therapy if he continues to have issues with lying, defecating, and urinating in his clothes." RP 7

3. Van Santford filed a Motion for Protection from Abuse Order in Kitsap County, Washington on behalf of the children on July 11, 2010 but it was denied for lack of jurisdiction over the petitioner.
4. Van Santford filed a Petition for modification of the parenting plan in Harvey County, Kansas on July 14, 2010. RP 57
    a. She requested to be able to return to Washington with the children. She stated she was fully aware that Harvey County, Kansas would retain jurisdiction.
5. On January 11, 2012, Van Santford was granted a Protection from Abuse Order on behalf of herself in Shawnee County, Kansas. RP 57
6. On January 4, 2012, Van Santford got a PFA against Sherwood in Shawnee County, Kansas. RP 57
7. January 2012, Van Santford went directly to Allen County Court and filed for an emergency order for temporary custody order due to the PFA. It was denied due to not being considered an emergency and set for hearing. RP 57
8. On September 5, 2012 there was a hearing on Van Santford's Petition to change residential custody in Allen County, Kansas.

She was awarded temporary custody and they moved to Washington State. RP 57

9. Beverly Santford filed a Petition for Modification of the Custody Decree/Parenting Plan/Residential Schedule in Kitsap County on March 10, 2014. RP 2
10. On April 4, 2014, a hearing was held regarding UCCJEA. It was decided Washington State would take jurisdiction over the case. RP 8
11. On December 13, 2014, a settlement conference/hearing was held. RP 23 & 33
12. On May 15, 2015, the trial regarding the Parenting Plan/Custody Order was held. RP 59

ARGUMENT

The trial court erred in applying the incorrect "best interests of the child" standard for custody.

"We conclude that the State has failed to demonstrate that this severe condition was reasonably necessary to prevent the children from

witnessing domestic violence. There can be no doubt that witnessing domestic violence is harmful to children. And there is ample evidence in the record that Ancira has not been an exemplary parent. But, contrary to the State's view, these broad assertions, standing alone, do not form a sufficient basis for this extreme degree of interference with fundamental parental rights." *State v. Ancira*, 107 Wn. App. 650, 27 P.3d 1246 (2001)

When determining whether Relocation of a child, RCW 26.29.520 is in the best interests of the child the following factors did not apply:

(3) Whether disrupting the contact between the child and the person with whom the child resides a majority of the time would be more detrimental to the child than disrupting contact between the child and the person objecting to the relocation;

The children lived with their father their entire lives. To tear them away and make it so they are not allowed to see him for long periods of time it very detrimental. I'm sure they love their mother but she left. Sherwood was the one constant for them.

(5) The reasons of each person for seeking or opposing the relocation and the good faith of each of the parties in requesting or opposing the relocation;

Van Santford lied to numerous courts of law regarding the abuse to herself and to the children. She decided to leave Kansas to go be with another man in Washington State. Then changed her mind and decided she wanted the children back but was unable to do that without fabricating abuse of her and when that didn't work she started fabricating abuse against the children.

(6) The age, developmental stage, and needs of the child, and the likely impact the relocation or its prevention will have on the child's physical, educational, and emotional development, taking into consideration any special needs of the child.

B.N.S., the party's son, has had many behavioral issues and is in special classes. Uprooting him from the home he has known, he needs stability which he had with his father. He was taken from a home he always knew and was put into a whole new family. Not to mention the fact he was questioned over and over about abuse that he never went through. His mother coerced him into saying awful things about his father is not healthy.

"Changes in custody are disruptive to children, so the courts generally opt for continuity and stability. Id. A two-step process to modify a parenting plan implements that policy. In re *Marriage of Zigler*, 154 Wn.

App. 803, 809, 226 P.3d 202 (2010) (citing RCW 26.09.260, .270). First, the parent seeking modification must file an affidavit showing adequate cause. RCW 26.09.270. If adequate cause is shown the court will then move to the second step: a full hearing. *Zigler*, 154 Wn. App. at 809. There the moving party must show that: (1) facts have arisen since the prior parenting plan, (2) those facts constitute a substantial change in the circumstances of the child or the nonmoving party, (3) the modification is in the best interest of the child, and (4) the child's environment is "detrimental to the child's physical, mental, or emotional health" and the harm caused by changing the environment is outweighed by the benefit. RCW 26.09.260(1), (2)(c)."

"Sections 2.2 and 2.7 of the court's order address the requirements of RCW 26.09.260(1) and (2)(c). Ms. Guardipee's primary argument here on appeal is that the court's findings in those sections are not supported by the evidence. *Quintero v. Quintero*, No. 28899-4-III, 9 (Wash. Ct. App. Oct 25, 2012).

Turning to the facts in this case, the Court of Appeals found that the evidence did not support a finding that Joseph's circumstances had substantially changed since the dissolution. Instead, it concluded, the trial judge erroneously changed residential placement to punish Hatch for

perceived wrongful conduct. *Schuster v. Schuster*, 90 Wn.2d 626, 630, 585 P.2d 130 (1978); *Thompson v. Thompson*, 56 Wn.2d 244, 250, 352 P.2d 179 (1960); *In re Marriage of Murphy*, 48 Wn. App. 196, 200, 737 P.2d 1319 (1987).

Custodial changes are viewed as highly disruptive to children, and there is a strong presumption in favor of custodial continuity and against modification. *In re Marriage of Stern*, 57 Wn. App. 707, 712, 789 P.2d 807, review denied, 115 Wn.2d 1013(1990); *Anderson v. Anderson*, 14 Wn. App. 366, 541 P.2d 996 (1975), review denied, 86 Wn.2d 1009 (1976).

Nonetheless, trial courts are given broad discretion in matters dealing with the welfare of children. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993); *In re Marriage of Cabalquinto*, 100 Wn.2d 325, 327-28, 330, 669 P.2d 886(1983).

A trial court's decision will not be reversed on appeal unless the court exercised its discretion in an untenable or manifestly unreasonable way. *Cabalquinto*, at 330; *In re Marriage of Griffin*, 114 Wn.2d 772, 779, 791 P.2d 519 (1990); *In re Marriage of Timmons*, 94 Wn.2d 594, 600, 603-04, 617 P.2d 1032 (1980); *George v. Helliar*, 62 Wn. App. 378,

385, 814 P.2d 238 (1991); *Chapman v. Perera*, 41 Wn. App. 444, 446, 704 P.2d 1224, review denied, 104 Wn.2d 1020 (1985).

Moreover, a trial court's findings will be upheld if they are supported by substantial evidence. First, statutes and case law have established a strong presumption against placement modifications because changes in residential placement are highly disruptive to children. RCW 26.09.002; RCW 26.09.260; RCW 26.09.270; *In re Marriage of Roorda*, 25 Wn. App. 849, 851, 611 P.2d 794 (1980); *George v. Helliar*, 62 Wn. App. 378, 814 P.2d 238 (1991).

Second, the standard for modification requires the court to find "upon the basis of facts that have arisen since" the parenting plan was entered "or that were unknown to the court at the time" the parenting plan was entered (1) that a substantial change has occurred in the circumstances of the child or the nonmoving party and (2) that the modification is in the best interest of the child and is necessary to serve the best interest of the child. RCW 26.09.260(1).

Furthermore,

(2) In applying these standards, the court shall retain the residential schedule established by the parenting plan unless:

(c) The child's present environment is detrimental to the child's physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child . . .

RCW 26.09.260(2)(c).

Subsection (2)(d) (formerly subsection (1)(d)) sets forth the standard to be applied in cases where one parent interferes with the other parent's residential time with the child.

That subsection requires the residential placement to be retained unless: The court has found the nonmoving parent in contempt of court at least twice within three years because the parent failed to comply with the residential time provisions in the court-ordered parenting plan, or the parent has been convicted of custodial interference in the first or second degree under RCW 9A.40.060 or 9A.40.070.

The trial court erred in denying Sherwood's Motion for Continuance.

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on

an incorrect standard or the facts do not meet the requirements of the correct standard. *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995) review denied, 129 Wn.2d 1003, 914 P.2d 66 (1996).

On October 19, 2015, Sherwood emailed to the Petitioner and filed a Motion for Continuance. Grounds for the continuance were: "Grounds for such motion being he has asked his current employer for the time off and was informed they have a big job that they really need him present for. He will also need more time to prepare himself financially to be able to afford the expenses of traveling to Washington for the trial. Lastly, he is asking for this continuance for more time to have proper preparation of the evidence needed for his case. He is requesting a continuance until after January 12, 2016 when this scheduling and financial conflict will be resolved."

Sherwood lives in Iowa. Santford lives in Washington. It's is harder for him to get to Court. He made the attempt but it just couldn't work. He has the right by law to ask for a continuance. The Court gave Santford a couple of them. This seems to be another biased issue. RP 55

The transcripts will show that the Judge got the Motion and very well could have ruled on it in favor of Sherwood. Instead, he asked the Plaintiff's attorney and moved on.

The Court: "What is your position on that?"

Redford-Hall: "We object to this, because this has been a long-term case that originally started in Kansas in 2011." RP 59 In Sherwood's defense Santford is the one who has been stalling.

The Declaration's of the respondent contained misleading information and hearsay

Van Santford made claims Sherwood was charged with rape but was aware that those charges were dismissed. **Order expunging charges** Also, on two separate findings of the Kansas DSHS are unsubstantiated. **SRS reports** Van Santford made numerous false statements throughout this case in order to mislead the Judge and get a verdict in her favor;

1. Van Santford told the court in her Declaration dated September 9, 2014, that Sherwood attempted to contact the children through Social Media. Yet her Declaration dated March 20, 2014 she states Sherwood had no contact with the children since December 3, 2014. Sherwood had been attempting to talk to his children but the therapist wasn't cooperating. September 2014, Sherwood got an order directing the children's therapist to communicate with Sherwood.

2. Van Santford told many different versions of the incident in December 2011.
    a. September 9, 2014:
    b. May 1, 2015:
3. In Van Santford's petition for modification of parenting plan in March 2014 she stated

RCW 9A.72.010 states; (1) "Materially false statement" means any false statement oral or written, regardless of its admissibility under the rules of evidence, which could have affected the course or outcome of the proceeding; whether a false statement is material shall be determined by the court as a matter of law;

(6) "Testimony" includes oral or written statements, documents, or any other material that may be offered by a witness in an official proceeding.

RCW 9A.72.020; (1) A person is guilty of perjury in the first degree if in any official proceeding he or she makes a materially false statement which he or she knows to be false under an oath required or authorized by law.

(2) Knowledge of the materiality of the statement is not an element of this crime, and the actor's mistaken belief that his or her statement was not material is not a defense to a prosecution under this section.

The trial court erred in finding in favor of Van Santford without sufficient evidence to her claims.

In re Marriage of Rideout, 150 Wn.2d 337, 351, 77 P.3d 1174 (2003) (holding the substantial evidence standard applied to a contempt proceeding based solely on documentary evidence because credibility was an issue, while noting that de novo is the general rule in such situations where credibility is not an issue); *Smith v. Skagit County*, 75 Wn.2d 715, 718-19, 453 P.2d 832 (1969). We note the Court of Appeals applied an abuse of discretion standard, *In re Marriage of Langham Kolde*, slip op. at 6, declining to follow Division Three, which reviewed a commissioner's decision de novo when based solely on documentary evidence, *In re Parentage of Hilborn*, 114 Wn. App. 275, 278, 58 P.3d 905 (2002). For the reasons stated, we believe de novo review is appropriate. *In re Parentage of Jannot*, 149 Wn.2d 123, 126, 65 P.3d 664 (2003) (holding that abuse of discretion was the proper standard when the trial court relied solely on documentary evidence in deciding

whether to modify a parentage plan). *Marriage Of Langham*, 153 Wn.2d 553 (Wash. 2005).

"The application of the substantial evidence standard in cases such as this is a narrow exception to the general rule that where a trial court considers only documents, such as parties' declarations, in reaching its decision, the appellate court may review such cases de novo because that court is in the same position as trial courts to review written submissions."

"RCW 26.09.160(1) provides as follows: An attempt by a parent . . . to refuse to perform the duties provided in the parenting plan, . . . shall be deemed bad faith and shall be punished by the court by holding the party in contempt of court and by awarding to the aggrieved party reasonable attorneys' fees and costs incidental in bringing a motion for contempt of court." *In re Marriage of Rideout*, 150 Wn.2d 337, 351, 77 P.3d 1174 (2003).

"Ultimately, the court determined that B was unable to characterize the difference between truthful and false statements and unable to express a memory of the incident in words, and found B incompetent to testify and therefore unavailable for purposes of RCW 9A.44.120."

"The court did, however, identify factors that are useful in determining reliability under RCW 9A.44.120: 1. Whether the declarant,

at the time of making the statement, had an apparent motive to lie; 2. Whether the declarant's general character suggests trustworthiness." *State v. C.J*, 148 Wn.2d 672, 673 (Wash. 2003).

The Court of Appeals, Division Three, reversed, holding that the trial court abused its discretion in admitting the child's hearsay statements because the evidence did not show that the child was competent at the time the statements were made. *State v. C.J.*,108 Wn. App. 790, 792, 32 P.3d 1051 (2001). Citing our decisions in *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984) and *Jenkins v. Snohomish County Public Utility District No. 1*, 105 Wn.2d 99, 713 P.2d 79 (1986), as well as the Court of Appeals, Division Two decision in *State v. Karpenski*, 94 Wn. App. 80, 971 P.2d 553 (1999), the court below held that before the trial court may admit a child's hearsay statement, it must determine whether the witness was competent at the time he made the statements as well as whether the statement satisfies the reliability requirements of RCW 9A.44.120. *C.J.*,108 Wn. App. at 796-97. Specifically, the Court of Appeals faulted the State for failing to establish that at the time B made the statements, he understood the difference between a truthful statement and a false statement, and that he understood his obligation to speak truthfully about the incident. *C.J.*, 108 Wn. App. at 797.

The court below did not consider the defendant's claim of error concerning the corroboration requirement in RCW 9A.44.120(2)(b). Accordingly, we will consider the issue. RAP 13.7(b).

RCW 9A.44.120(2)(b) requires that if a child declarant is unavailable to testify as a witness at trial, the abusive act described in the child's statements must be corroborated by evidence of the act. While the confrontation clause does not require it, the legislature included that additional requirement to reduce the risk that the emotional appeal of a child's out-of-court statement would result in an erroneous conviction. *Jones*, 112 Wn.2d at 494-95; RCW 9A.44.120(2)(b). Corroboration of the criminal act described by an unavailable child declarant's hearsay statement may not be used to "bootstrap" the statement for purposes of determining its reliability. *Ryan*, 103 Wn.2d at 174. The finding of corroborative evidence that supports the hearsay statement is independent of the statement's reliability. *Ryan*, 103 Wn.2d at 174. Also, each act of abuse must be separately corroborated under the statute. *Jones*, 112 Wn.2d at 496.

The trial court's findings of fact will not be disturbed on appeal if supported by substantial evidence. *In re P.D.*, 58 Wn. App. 18, 25, 792 P.2d 159, review denied, 115 Wn.2d 1019 (1990). Review is

limited to ascertaining whether the findings are supported by substantial evidence, and if so, whether they support the conclusions of law. This determination must be made in light of the degree of proof required. RCW 13.34.190(2) requires the trial court to find beyond a reasonable doubt (1) that there is little likelihood parental deficiencies will be remedied in the near future, and (2) that continuation of the parent-child relationship clearly would interfere with placement in a stable, permanent home. RCW 13.34.180(5), (6). We find the record substantially supports the findings and conclusions of the trial court. *In re C.B.*, 79 Wn. App. 686, 904 P.2d 1171 (1995)

"The application of the substantial evidence standard in cases such as this is a narrow exception to the general rule that where a trial court considers only documents, such as parties' declarations, in reaching its decision, the appellate court may review such cases de novo because that court is in the same position as trial courts to review written submissions." "RCW 26.09.160(1) provides as follows: An attempt by a parent . . . to refuse to perform the duties provided in the parenting plan, . . . shall be deemed bad faith and shall be punished by the court by holding the party in contempt of court and by awarding to the aggrieved party reasonable attorneys' fees and costs incidental in bringing a motion for contempt of

court." *In Re the Marriage of Rideout and Rideout*, 150 Wn.2d 337, 338 (Wash. 2003).

The trial court erred in awarding Van Santford attorney's fees.

Van Santford started this whole case. Again, dragging it through numerous counties between Kansas and Washington. Sherwood has paid a high amount of attorney's fees as well trying to defend himself from another state.

A court may award attorney fees if one party's intransigence caused the other party to incur additional legal fees. *In re Marriage of Bobbitt*, 135 Wn. App. 8, 30, 144 P.3d 306(2006).
This is not the case in this matter. Van Santfords misconduct in this case should not allow her attorney's fees.

Bobbitt, 135 Wn. App. at 30; *In re Marriage of Greenlee*, 65 Wn. App. 703, 708-09, 829 P.2d 1120 (1992). Where a party's misconduct "permeate[s] the entire proceedings, the court need not segregate which fees were incurred as a result of intransigence and which were not." *In re Marriage of Burrill*, 113 Wn. App. 863, 873, 56 P.3d 993 (2002). We review a trial court's award of attorney fees for abuse of discretion. *In re*

Marriage of Mattson, 95 Wn. App. 592, 604, 976 P.2d 157 (1999). *In re Gibson*, NO. 66833-1-I, 41 (Wash. Ct. App. Dec 03, 2012).

Santford is the reason we are here. Sherwood was willing to come up with a fair and agreeable solution. Santford is the one that has dragged this out. Santford is the one who agrees and then changes her mind and brings Sherwood to Court. Sherwood should not be responsible for her attorney's fees. Sherwood offered to pay 50% of the GAL and Santford wouldn't do it.

CONCLUSION

The Appellee is seeking to establish a parenting plan that provides for reintegration and eventually a regular visitation schedule. The Appellant has used all efforts, including continuances, moving the case and now refusal to pay her fair share, to delay and stall and prevent the Appellee from seeing or talking to his children now for 3 years. It's in the children's best interest to have a relationship with their father. No abuse has been found and there is no evidence of any reason to prevent reintegration. Order of the Trial Court RP 66

Respectfully Submitted,

Harold Dan Sherwood in Pro Se

DATED: 7-21-2016

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), that the attached BRIEF FOR Harold Dan Sherwood AS APPELLEE:

(1) Complies with Federal Rule of Appellate Procedure 32(a)(7)(b) because it contains 8,334 words, 645 lines, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(b)(iii); and

(2) Complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has

been prepared in a proportionally spaced typeface using Word 2016, in a 12-point Times New Roman font.

Harold Dan Sherwood in Pro Se

Dated: 7-20-16

CERTFICATE OF SERVICE

I hereby certify that on 7-21-16, I filed the foregoing with the Clerk of Court for the United States Court of Appeals Division II and certified mailed a copy to the Petitioner/Appellate located at

Beverly van Stanford

7 on 21-2016.